

Dissenting Views
to H.R. 4623, the
“Child Obscenity and Pornography Prevention Act of 2002”

H. R. 4623, the “Child Obscenity and Pornography Prevention Act of 2002” is a hasty attempt drafted by the Department of Justice to override the United States Supreme Court’s decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. ____ (2002). While the intentions of the authors may be good, the bill is fatally flawed.

H.R. 4623 seeks to ban “virtual child pornography”. It not only defines child pornography as virtual child pornography that is “indistinguishable” from real child pornography, but makes even possession of an image that is “indistinguishable” a crime.

Child pornography is despicable and illegal, and must be banned and prosecuted. However, pornography that does not involve a child is just that – pornography, which, if not obscene, is not illegal. To constitute “child pornography”, a real child must be involved. Computer generated images depicting child-like characters which do not involve real children do not constitute child pornography any more than a movie with a 22 year old actor who plays, and looks, the role of a 15 year old engaging in explicit sexual activities .

Pornography, computer generated or not, which is produced without using real children, and is not otherwise obscene, is protected under the First Amendment. H.R. 4623, like the Child Pornography Prevention Act (CPPA) struck down in *Ashcroft v. Free Speech Coalition*, attempts to ban this protected material, and therefore is likely to meet the same fate. The fatal flaw in the (CPPA) was its criminalization of speech that was neither “obscene” under *Miller v. California*, nor “child pornography” involving the abuse of real children under *New York v. Ferber*. H. R. 4623 repeats that mistake. Like the CPPA, this bill would not only criminalize speech that is not obscene, but also speech that has redeeming literary, artistic, political or other social value. For example, the bill would punish therapists and academic researchers who used computer-generated images in their research, and film makers who create explicit anti-child abuse documentaries.

H. R. 4623 creates a strict liability offense. Under the bill, prohibited images may not be possessed for any reason, however legitimate. Therefore, any scholarly research that may be used to verify or refute the underlying assumptions of the bill is rendered impossible.

Proponents of the bill believe the court left open the question of whether the government can criminalize computer generated images that are not obscene and do not involve real children. Obscene images can always be prosecuted, but the Court clearly said that the government cannot criminalize images which are not obscene unless the product involved actual children. In striking down the offending portions of CPPA and upholding its decision in *New York v. Ferber*, 458 U.S. (1982), the court stated:

“In contrast to the speech in *Ferber*, speech that itself is the record of sexual abuse, the CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not “intrinsically related” to the sexual abuse of children, as were the materials in *Ferber*, at 759.” (page 12)

Ferber, then, not only referred to the distinction between actual and virtual child pornography, it relied on it as a reason supporting its holding. *Ferber* provides no support for a statute that eliminates the distinction and makes the alternative mode criminal as well.” (Page 13)

Also, in interpreting the case of *Osborne v. Ohio*, 495 U.S.103 (1990), the Court stated:

“*Osborne* also noted the State’s interest in preventing child pornography from being used as an aid in the solicitation of minors. *Id.*, at 111. The Court, however, anchored its holding in the concern for the participants, those whom it called the “victims of child pornography.” *Id.*, at 110. It did not suggest that, absent this concern, other governmental interests would suffice. See *infra*, at 13–15. (page 12)

“The case reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment. See *id.*, at 764–765 (“[T]he distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection”).” (Page 13)

Proponents also argue that the Court did not consider the harm to real children that will occur when, through technological advances, it will become impossible to tell real children from “virtual” children, thereby allowing harm to real children because the government cannot tell the difference for purposes of bringing prosecution. The Court clearly did consider it and Stated:

“The Government next argues that its objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well. Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced

through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.” (Page 16)

Nor was the court persuaded by the argument that virtual images will make it very difficult for the government to prosecute cases. As to this concern, the Court stated the following:

Finally, the Government says that the possibility of producing images by using computer imaging makes it very difficult for it to prosecute those who produce pornography by using real children. Experts, we are told, may have difficulty in saying whether the pictures were made by using real children or by using computer imaging. The necessary solution, the argument runs, is to prohibit both kinds of images. The argument, in essence, is that protected speech may be banned as a means to ban unprotected speech. This analysis turns the First Amendment upside down.

The Government may not suppress lawful speech as the means to suppress unlawful speech.” (Pages 16-17)

And, finally, the government suggests that because the Court determined that it need not decide whether an affirmative defense could save an otherwise unconstitutional statute, it left open that possibility. That may be true, but, despite its recognition it need not decide the issue of affirmative defenses in the case before it, the Court went out of its way to make clear how it views such efforts with the following language:

“To avoid the force of this objection, the Government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused to prove the speech is lawful. In this connection, the Government relies on an affirmative defense under the statute, which allows a defendant to avoid conviction for non-possession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. See 18 U.S.C. §2252A(c).”

“The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain

of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor.” (Pages 17-18)

The *Ashcroft* decision, essentially reiterated the principles of *Ferber* regarding the boundaries for fighting child pornography:

1. Non-obscene descriptions or depictions of sexual conduct that do not involve real children are a form of speech, even if it is despicable speech, protected by the First Amendment. (Reaffirming *Ferber*.)
2. The government should focus its efforts on education and on punishment for violations of the law by those who actually harm children in the creation of child pornography rather than on abridgment of the rights of free speech of those who create something from their imagination. Slip Opinion at 7 [*Kingsley Int’l Pictures Corp. v. Regents of Univ. of N.Y.*, 360 U.S. 684, 689 (1959)]
3. The fact that speech may be used to perpetrate a crime, for example, enticement or seduction, is insufficient reason to ban the speech. “The government may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’” Slip Opinion at 15 [*Hess v. Indiana*, 414 U.S. 105,108 (1973) (*per curiam*)]
4. “The Government may not suppress lawful speech as the means to suppress unlawful speech.” Slip Opinion at 17. Banning protected speech (virtual child porn) in order to ban unprotected speech (child porn using real children) “turns the First Amendment upside down.” *Id.* “Protected speech does not become unprotected merely because it resembles the latter.” *Id.*

Conclusion

Because H. R. 4623 repeats the same mistakes condemned in *Ashcroft v. Free Speech Coalition*, it is not likely to be upheld.

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